Supreme Court, U.S.
FILED
NOV 15 2001
CLERK

No. 01-638

IN THE

# Supreme Court of the United States

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STATE ENGINEERING ASSOCIATION, *et al.*,
*Petitioners*,

v.

GEORGE LIGHTBOURN, Acting Secretary of the Wisconsin Department of Administration, *et al.*,
*Respondents*.

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**On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin**

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## BRIEF FOR RESPONDENT WISCONSIN EDUCATION ASSOCIATION COUNCIL IN OPPOSITION

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## QUESTION PRESENTED

Whether the Wisconsin Supreme Court erred in construing the Wisconsin statutes that establish and govern the Wisconsin Retirement System as permitting the Wisconsin Legislature to enact a law that, for a limited period of time, treats a designated portion of the assets in the trust as a credit against future employer contributions, where that arrangement neither reduces the benefits of any participant nor takes any assets from the System, and where the decision to adopt the credit arrangement was based on the fact that trust assets had increased so dramatically that adopting the credit would not affect the actuarial soundness of the trust.

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## STATEMENT

### A. The Wisconsin Retirement System

The Wisconsin Retirement System ("WRS") provides retirement benefits for employees of state and local governments in Wisconsin, including public school teachers represented by respondent Wisconsin Education Association Council ("WEAC"). Appendix to Petition for Writ of Certiorari ("App.") 9-10, 116-119.

Retirement benefits provided by the WRS generally are determined by a "defined benefit" formula, under which a participant's credited service is multiplied by his or her final

average salary and, in turn, by a percentage multiplier. App. 20, 103-104. The WRS also includes a "defined contribution" money purchase plan which provides greater benefits for some participants than the defined benefit formula would yield. App. 21, 104.

To fund these benefits, contributions are made by or on behalf of each active employee, in amounts fixed by statute as a specified percentage of the employee's income. App. 10, 111. Virtually all of these "employee contributions" actually are made by state and local government employers on the employee's behalf. App. 10.

In addition, covered employers are required to make contributions at rates expressed as a percentage of total payroll. The contribution percentages for these employer contributions are not fixed by statute but are determined annually by actuarial analyses. App. 12-14, 112-113.

The monies received by the WRS are held in trust and allocated to several different accounts, of which three are relevant here. Employee contributions are held in the "employee accumulation reserve;" employer contributions are held in the "employer accumulation reserve;" and all gains and losses of all the trust accounts are initially allocated to the "transaction amortization account," or "TAA." App. 17-24, 104-110.

Under the statutory scheme as it stood in 1999, twenty percent of the TAA balance was distributed to the other accounts each year. Wis. Stat. § 40.04(3)(ab) (App. 150). (Prior to 1989, the annual distribution had been set at seven percent. App. 23, 108.) On two previous occasions, legislation was enacted providing for special one-time distributions from the TAA to the other accounts. App. 24, 108-109.

Wis. Stat. § 40.01(2) states that the WRS trust fund "shall be managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment *at the lowest*

*possible cost* of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose." App. 142 (emphasis added).

Although rights exercised and benefits accrued by employees under the WRS are contractual in nature, Wis. Stat. § 40.19(1) specifically acknowledges and defines the right of the state to make various statutory changes in the WRS. That section provides as follows (App. 159):

> Rights exercised and benefits accrued to an employee under this chapter for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act. The right of the state to amend or repeal, by enactment of statutory changes, all or any part of this chapter at any time, however, is reserved by the state and there shall be no right to further accrual of benefits nor to future exercise of rights for service rendered after the effective date of any amendment or repeal deleting the statutory authorization for the benefits or rights. This section shall not be interpreted as preventing the state from requiring forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights and benefits of equal or greater value to the participant.

**B. Act 11**

As a result of successful investment experience, the TAA balance skyrocketed from under $2.5 billion in 1994 to nearly $14 billion in 1999. App. 110. In that year the Wisconsin legislature enacted Act 11, which made several changes in the WRS.

First, in a provision not challenged in this Court, Act 11 provides for a one-time distribution of $4 billion from the TAA to the other trust accounts. App. 29. As the Wisconsin Supreme Court characterized it, this was "a legitimate recognition of gains in the TAA, properly dispersed to those who are entitled to receive them." App. 64.

Second, Act 11 provides "substantial benefit improvements," *id.*, including significant increases in the monthly multipliers. App. 25-28.

Third, having added $1.236 billion to the employer reserve account as part of the $4 billion distribution from the TAA, App. 70, Act 11 provides that $200 million of that $1.236 billion increase will be treated as a credit against future contributions employers otherwise would be required to make. 1999 Wis. Act 11, § 27(1)(b)(1) (App. 71). *See* App. 29-30. This does *not* remove any funds from the trust. App. 77. Nor does it affect "the contractual benefit to be received by participants." App. 74.

"Nothing in Act 11 permits employers to back away from their obligation to pay accrued benefits." App. 75. Rather, the $200 million credit provides government employers with a short "respite from employer contributions," *id.*, in a manner that "do[es] not . . . threaten[ ] the security of the trust fund," *id.*, but merely allows the employers to forgo contributing money that "is not needed now, may not be needed in the future, and absolutely would have to be paid if ever it is needed," *id.*

Act 11 expressly provides that "the employee trust funds board shall retain authority to maintain proper actuarial funding of the Wisconsin retirement system." 1999 Wis. Act 11, § 27(3). The Wisconsin Supreme Court has construed this as "a fail-safe for the WRS that overrides all other provisions of Act 11." App. 79.

### C. The Decision Below

Two public employee organizations—petitioner State Engineering Association and the Wisconsin Professional Police Association—brought an original action in the Supreme Court of Wisconsin challenging various provisions of Act 11 under state and federal law. Respondent WEAC—which also is a public employee organization, but

which believes that the provisions of Act 11 are beneficial to public employees and retirees—participated in the action as a respondent.

In addressing petitioners' challenges, the Wisconsin Supreme Court began by analyzing the provisions of the statutes governing the WRS that define the nature and limits of participants' legally protected interests in the retirement system. App. 49-57.

The Court found Wis. Stat. § 40.19(1), quoted *supra* at 3, to be particularly significant in that regard, because that provision speaks expressly to the question of legislative changes. App. 51-53. The Court held that "§ 40.19(1) requires a balancing of interests," App. 52-53, with participants enjoying "certain contractual rights that may not be abrogated by any subsequent legislative act," App. 53, but with the state free nevertheless to modify various "procedural or substantive aspect[s] of the WRS," *id.*

The Court also viewed Wis. Stat. § 40.01(2) as "requir[ing] some balancing of competing interests," App. 55, because that provision dictates that the purpose of the WRS is to "fulfill[ ] benefit commitments" at "the lowest possible cost," *id.*

The Court concluded that an interest in "the integrity and security" of retirement funds "is inherent in Wis. Stat. §§ 40.01 and 40.19." App. 57. But the Court did not view that statutorily-created interest as prohibiting changes in the retirement system that do not "threaten the actuarial soundness of the retirement fund," *id.*, and that are not "likely [to] result in nonpayment of or decrease in accrued benefits," *id.*

Applying those principles to petitioners' attack on the $200 million contribution credit, App. 70-81, the Wisconsin Court emphasized (i) that the credit (and for that matter, the size of the employer reserve balance) "is not relevant to a

participant's accrued retirement benefit" and "does not determine the contractual benefit to be received by participants," App. 74; (ii) that the credit does not affect in any way the obligation of employers to fulfill "their obligation to pay accrued benefits," App. 75; and (iii) that "no money is removed from the employer reserve" as a result of the credit, App. 77.

The Court examined each of the respects in which petitioners argued that the $200 million credit provision affected their interests, and concluded that none of them involves any legally protected right.

First, the Court observed that petitioners were claiming an interest not only in "the *fulfillment* of accrued benefits," App. 75 (emphasis added), but in "the *relative security* of accrued benefits," *id.* (emphasis added). The Court acknowledged that the trust fund might be somewhat "more secure" without the $200 million credit arrangement, App. 76, but the Court examined the Wisconsin statutes governing funding of the WRS and concluded that those statutes "do[ ] not demand absolute security," *id.* Because of that feature of the state statutes, and because petitioners conceded that Act 11 does not "threaten[ ] the security of the trust fund," App. 75, the Court concluded that petitioners' general interest in the security of the fund did not give rise to any property interest that had been taken from them by Act 11, App. 75-76, 79, nor to any contractual right that was impaired by the Act, App. 80-81. On the contrary, the Court pointed out that Act 11 specifically requires that "proper actuarial funding of the Wisconsin retirement system" be "maintain[ed]." App. 79.[1]

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[1] While "admit[ting] that the provisions of Act 11, in and of themselves, do not leave the trust fund in a financially troubled condition," App. 81, petitioners argued in the court below that a decision upholding Act 11 would "serve as a dangerous precedent 'for future legislative [actions] that could threaten the solvency and actuarial soundness of the Trust Fund,'" *id.* Because such facts were not presented by this case, the

Second, the Court observed that petitioners were "claim-[ing] a right to maximize the chance for additional benefits in the future." App. 75. Specifically, "[petitioners] reason that the greater the balance in the employer reserve, the more likely it is that the legislature will vote to increase retirement benefits." App. 78. The Court found nothing in the Wisconsin statutes that gave petitioners a protected interested in such "speculative . . . possibilities for an increase in retirement benefits sometime in the future," *id.*—particularly in the face of § 40.01(2), which provides that the purpose of the WRS is "ensuring the fulfillment *at the lowest possible cost* of the benefit commitments to participants, as set forth in this chapter" (emphasis added). *See* App. 79 ("Speculation about how benefits might be increased in the future does not outweigh the legislature's right to amend the provisions of Chapter 40 to reduce employer costs on a temporary basis, provided the WRS remains secure.")

With respect to petitioners' impairment-of-contract claim, the Court placed particular emphasis on Wis. Stat. § 40.19(1), which expressly permits legislative modifications of the WRS, *see supra* at 3, and which the Court found to be "just as much a part of the contract as any other provision in Chapter 40." App. 80.

The Court also addressed respondents' argument that the $200 million credit might increase the possibility of a shortfall in the fund at some time in the future, which might result in employees being required to make greater contributions to the trust. App. 76-77. Noting that it was "not faced with these facts," App. 76, the Court stated that, "[s]hould employees as a class ever have to make contributions to the employer reserve, they may renew the argument that the balance in the fund would have been greater if there had been no employer credits," App. 77.

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Wisconsin Court found no need to address "the specter of an extreme situation." *Id.*

The Wisconsin Supreme Court therefore concluded that the $200 million credit arrangement did not abridge any legally protected interest of the petitioners.

## ARGUMENT

Petitioners posit a conflict among decisions of various state courts as to whether "the vested property and contract rights" of participants in a statutory public employee retirement system are "limited to their benefit commitments" or "extend to the assets and earnings contained in the . . . Trust Fund." Petition for Writ of Certiorari ("Pet.") at 15. Petitioners urge the Court to resolve this putative conflict in favor of the proposition "that participants have a vested interest in the underlying assets of their pension system," Pet. 16, rather than only a right "to satisfaction of their benefit commitments," Pet. 17.

For two reasons, this case does not provide a vehicle to decide the question petitioners propose.

### I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER STATE COURT, BECAUSE IT RESTS ON THE WISCONSIN SUPREME COURT'S CONSTRUCTION OF STATE STATUTES THAT ARE UNIQUE TO WISCONSIN.

Petitioners acknowledge, as they must, that any "contractual and property rights" they may possess with respect to the WRS are "established by" the Wisconsin statutes governing the retirement system. Pet. 28-29. *See National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985) ("[w]here the claim is that the State's policy embodied in a statute is to bind its instrumentalities by contract, the cardinal inquiry is as to the terms of the statute supposed to create such a contract") (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104

(1938)); *Bishop v. Wood*, 426 U.S. 341, 344-345 (1976) (whether a property interest exists "must be decided by reference to state law," and "can be determined only by an examination of the particular statute or ordinance in question").

Consistent with these principles, the Wisconsin Supreme Court based its decision in this case on a construction of the relevant provisions of the Wisconsin statutes that establish and govern the WRS. Those provisions are unique to Wisconsin, and have no counterparts in the statutory schemes of the other jurisdictions whose caselaw petitioners cite. Consequently, there is no conflict for this Court to resolve.

1. As petitioners state, *see* Pet. 28, the provision that is most crucial to their claims is Wis. Stat. § 40.19(1), which addresses in terms the right of the state legislature to make modifications in the WRS. Section 40.19(1) (quoted *supra* at 3), is a complex provision which distinguishes certain rights that "shall not be abrogated by any subsequent legislative act" from other aspects of the WRS as to which "[t]he right of the state to amend or repeal, by enactment of statutory changes . . . is reserved by the state." The Wisconsin Supreme Court construed this provision as permitting the enactment of the $200 million credit at issue. App. 80. We believe the Court was correct in that regard. But whether correct or not, the decision rests squarely on the Wisconsin Court's interpretation of an unusual Wisconsin statutory provision containing language very different from the statutes involved in the cases from other jurisdictions petitioners have cited.

2. The Wisconsin Court also relied on Wis. Stat. § 40.01(2), which provides that the purpose of the WRS trust fund is "ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth in this chapter." The Court found the $200 million credit to be "in conformity with Wis. Stat. § 40.01(2)." App. 80-81. None of

the other cases petitioners cite involved retirement systems which expressly provide for a balance between *fulfilling existing benefit commitments* and doing so "at *the lowest possible cost*."

3. The Wisconsin Court also emphasized the particular manner in which the $200 million credit provision of Act 11 operates, the limited impact of the provision, the fact that "absolute security" has never been a feature of the WRS, and the adoption in Act 11 of a "fail-safe" provision which ensures that "proper actuarial funding of the Wisconsin retirement system" shall be "maintain[ed]." *See supra* at 5-7. Each of those features of the Wisconsin statutes also serves to distinguish the situation here from the cases cited by petitioners that arose under statutes of other states.

Because the Wisconsin Court's determination that no property or contract rights were abridged in this case rests on a construction of state statutory provisions that are unique to Wisconsin, petitioners are far off the mark in suggesting that the decision below conflicts with decisions of other state courts. *See* Pet. 15-17. There is no such conflict, and review by this Court of the decision below would involve nothing more than second-guessing the Wisconsin Supreme Court's construction of the Wisconsin statutes.[2]

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[2] This reality is reflected in petitioners' lengthy argument as to why they believe the decision is contrary to "Wisconsin law," Pet. 19-22 (*see also* Pet. 16-17,18) and in petitioners' repeated elaborations of their construction of various subsections of Chapter 40 of the Wisconsin statutes, *see* Pet. 21-24, 27-29.

## II. THE WISCONSIN STATUTE CHALLENGED IN THIS CASE DOES NOT INVOLVE ANY TAKING OF RETIREMENT FUND ASSETS, OR ANY OTHER ACTION OF A TYPE THAT HAS BEEN FOUND UNCONSTITUTIONAL BY ANY COURT

Even putting aside the dispositive consideration that the state statutes governing this case are fundamentally different from the statutes of the states whose courts, in petitioners' words, "have held that participants have a vested interest in the underlying assets of their pension system," Pet. 16, the decision below does not conflict with the decisions of those courts for an additional reason: the challenged $200 million credit does not take, or affect in any way, "the underlying assets of [the Wisconsin] pension system."

The $200 million credit does not remove any funds from the employer accumulation reserve account or from any other WRS trust account. App. 77. "All money in the employer reserve remains in the reserve and will go toward funding future benefits." App. 79. Thus, this case does *not* present the question whether participants' rights in a pension system extend to "the underlying assets," Pet. 16, or instead are "limited to satisfaction of their benefit commitments," Pet. 17—which is the conflict petitioners attempt to pose. Rather, all that the $200 million credit does is to dispense with *future employer contributions* for a limited period of time. App. 70-71.[3]

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[3] Thus, petitioners' argument that they have a property interest "in all the assets and earnings of the WRS," Pet. 19, is beside the point. Treating $200 million of the employer reserve as a credit against future contributions is no different in purpose or effect from simply providing that otherwise-required future employer contributions will be reduced by $200 million. In administering the system, it is a useful construct to treat the $200 million as "paying" the employers' contributions, but this "credit" approach does not "take" trust assets and give them to employers, any more than would be the case with a simple moratorium on

No case cited by petitioners—and no case of which we are aware—has held that a law reducing contributions to a public employee retirement system violates federal constitutional rights where, as here, the legislation responds to a dramatic increase in the assets of the system, and the retirement fund continues to be actuarially sound.

In *Dadisman v. Moore*, 384 S.E.2d 816 (W. Va. 1988), and *Dombrowski v. City of Philadelphia*, 245 A.2d 238 (Pa. 1968), the claim was that the legislative change had made the fund "actuarially unsound." *Dadisman*, 384 S.E.2d at 822; *Dombrowski*, 245 A.2d at 246-247. Indeed, the *Dadisman* court stated that a legislative "alteration to the pension scheme" would *not* constitute an impairment of contract if it "serves to keep the system sound and flexible," 384 S.E.2d at 827—as is the case with Act 11.

In both *Valdes v. Cory*, 189 Cal. Rptr. 212 (Cal. App. 1983), and *Weaver v. Evans*, 495 P.2d 639 (Wash. 1972), the courts (an intermediate appellate court in *Valdes*, and a court applying *state* law in *Weaver* [4]) stated that the test for a permissible legislative modification of a retirement system is whether the modification "bear[s] some material relation to the theory of a pension system and its successful operation." *Valdes*, 189 Cal. Rptr. at 221; *Weaver*, 495 P.2d at 649. That

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contributions. And this is true even accepting petitioners' characterization of the WRS's unfunded liability as a "debt" owed by contributing employers. *See* Pet. 29. Nothing in Act 11 forgives that "debt." The $200 million credit only affects the manner and timing of funding the unfunded liability, not the ultimate obligation to provide the necessary funding; and the Wisconsin statutes never have given WRS participants an unalterable right to any particular funding methodology. App. 76, 78, 79.

The tortured nature of petitioners' efforts to explain in the court below how the $200 million credit supposedly harms their interests, *see supra* at 6-7, provides further confirmation that the situation presented here is worlds away from any taking of property or impairment of contract.

[4] Federal law is not mentioned in the opinion in *Weaver*.

test plainly is satisfied in this case. In *Valdes* and *Weaver*, it was not satisfied because the legislatures had enacted a moratorium on pension contributions in order to solve a statewide fiscal crisis, *without any apparent regard for the sufficiency of the retirement fund's assets*. *Valdes*, 189 Cal. Rptr. at 226; *Weaver*, 495 P.2d at 640-641. Here, in contrast, the legislature took pains to preserve the actuarial soundness of the system: the $200 million credit against future contributions was enacted in response to a huge increase in trust fund assets, as a result of which the contributions represented by the credit simply are "not needed now, may not be needed in the future, and absolutely will have to be paid for if ever it is needed." App. 75. *See supra* at 4.[5]

In sum, the provision of Act 11 that is challenged by petitioners is a measured and sensible response to the huge unanticipated increase in the assets of the WRS that had developed in the period preceding enactment of the legislation. No court—much less any court construing provisions such as are found in the unique state statutes that govern this case—has held that a legislature is precluded by the federal Constitution from adopting a temporary "respite from employer contributions," App. 75, in such circumstances. This case presents no conflict of caselaw, and no issue that warrants review.

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[5] Quixotically, petitioners assert that the Wisconsin Supreme Court's decision conflicts with prior *Wisconsin* cases. *See* Pet. 16-17. However, to mention only one of many distinctions, the earlier Wisconsin cases on which petitioners rely involved the *removal of assets* from a trust fund. *See Association of State Prosecutors v. Milwaukee County*, 544 N.W. 2d 888 (Wis. 1996); *State Teachers' Retirement Board v. Giessel*, 106 N.W. 2d 301 (Wis. 1960).

Petitioners also cite *McDermott v. Regan*, 624 N.E. 2d 985 (N.Y. 1993), but that case arose under state, not federal law; and, unlike the situation here, the legislative change in *McDermott* resulted in an "inappropriate level of risk" that accrued benefits might not be paid. *Id.* at 988.

## CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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